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No. 05-8794

In the
Supreme Court of the United States

CLARENCE EDWARD HILL,
Petitioner,

v.

JAMES R. MCDONOUGH, INTERIM SECRETARY OF THE FLORIDA DEPARTMENT OF CORRECTIONS, in his official capacity, ET AL
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE STATES OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, PENNSYLVANIA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a complaint brought under 42 U.S.C. §1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. §2254.

2. Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. §1983.

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INTEREST OF AMICI

The amici States all employ the death penalty as a means of punishing society's vilest offenders. Amici are keenly interested in ensuring that their capital sentencing schemes remain viable. Viability depends, in large part, on the States' ability to carry out duly-adjudicated death sentences in a timely manner. Eleventh-hour litigation like Hill's fatally frustrates that objective. Amici thus respectfully urge this Court to preclude death-sentenced inmates from filing last-minute execution-related claims - among them, challenges to the particular cocktail of chemicals that constitute a lethal injection - under the banner of 42 U.S.C. §1983. In so doing, this Court will both (i) enforce the carefully-crafted limitations that Congress has expressly written into the federal habeas corpus statute and (ii) honor the States' compelling interest in finality.

SUMMARY OF ARGUMENT

1. This Court should reject Hill's argument that §1983 is available because he is challenging only an execution "procedure," and not his execution *per se*. In the real world, there is no meaningful distinction between the two, and experience shows that an inmate can block an execution just as surely by challenging a "procedure" as by challenging his sentence directly. The story of David Larry Nelson, with whom this Court is familiar, is instructive. On remand from this Court's decision in *Nelson v. Campbell*, the State of Alabama took the challenged "cut-down" off the table as a means of accessing Nelson's veins and agreed, instead, to utilize Nelson's own preferred procedure, "percutaneous central line placement," which this Court had emphasized in allowing Nelson's §1983 claim to proceed. Although the State's concession should have - according to Nelson's own representations to this Court - led promptly to Nelson's execution, such was not to be the case. Instead, Nelson about-faced and, incredibly, attacked his own chosen

procedure as "cruel and unusual." To its consternation, the State continues to this day to litigate Nelson's (mutated) case in district court. The lesson of *Nelson* is simply this: Execution "procedures" are innumerable, and the incentive to muster and mount new (and even contradictory) challenges to those procedures as a means of delaying an impending execution is overwhelming. This Court's §1983 jurisprudence must account for that reality.

2. Hill's chemical-composition claim, had it been filed in a habeas corpus petition, would have been barred as "second or successive" within the meaning of 28 U.S.C. §2244(b)(2). That provision states expressly that a claim, like Hill's, that rests on a previously unavailable "factual predicate" may form the basis of a second habeas petition *only* if it implicates the petitioning inmate's actual innocence, which Hill's plainly does not. None of Hill's efforts to avoid §2244(b)(2)'s plain language is persuasive. *First*, it is not the case that any claim that might not have constituted an "abuse of the writ" under pre-AEDPA law cannot be deemed "second or successive" within the meaning of amended §2244(b)(2). Any such argument rests on the untenable premise AEDPA was just a blip, and that in comprehensively amending the habeas statute Congress merely sought to codify business as usual. *Second*, neither *Stewart v. Martinez-Villareal* nor *Slack v. McDaniel* salvages Hill's counter-textual argument. In both of those decisions, this Court - given the unique procedural circumstances involved - was able to permit claims to go forward without re-writing §2244(b)(2)'s clear text. Hill's broader contention, by contrast - that an inmate may file a second petition based solely on a new claim's newness, and even where his first petition was adjudicated on the merits - would break the camel's back. *Finally*, it is no answer to suggest that there might be some difference between (i) an inmate whose claim existed but was unavailable when he litigated his first habeas petition and (ii) one whose claim simply did not exist at that time. That distinction cannot be squared with §2244(b)(2)'s language, which (looking back to pre-AEDPA

law) encompasses petitioners in both situations and requires both to show innocence before proceeding. Nor does it comport with common sense; the equitable considerations pertinent to both petitioners are identical in that neither can be faulted for failing to raise his claim earlier.

3. Hill has not been denied a remedy here. The record makes clear that before rejecting Hill's Eighth Amendment claim the Florida Supreme Court considered it on the merits and in detail. This Court then reviewed and denied Hill's petition for a writ of certiorari pertaining to the Florida court's merits decision. Hill's *real* argument - that he is entitled, one way or another, to litigate his claim in federal district court - has been rejected before, and should be rejected again. In a line of decisions culminating in *Allen v. McCurry*, this Court has (i) emphasized that state courts are fully capable of adjudicating federal constitutional claims and (ii) rejected any suggestion that just because a constitutional claim is not cognizable on federal habeas, it must be cognizable under §1983.

ARGUMENT

"Obviously, a challenge to the chemicals used for lethal injection constitutes a challenge to the sentence of death by lethal injection." That was petitioner David Larry Nelson's position in *Nelson v. Campbell*, 541 U.S. 637 (2004). *See* Petitioner's Supplemental Cert. Reply Br. at 6. Indeed, Nelson's lawyer reiterated that position time and time again in this Court. *See, e.g.*, Oral Arg. Tr. 13-14 (Q: "[W]ould you be making the same argument [that §1983 is available] if his complaint was not this inch cut but the combination of chemicals?" A: "No, Your Honor."); *id.* at 14 (Q: "[W]hat is the difference between ... your using a drug that's going to hurt me and your using a catheter procedure that's going to hurt me?" A: "I think the primary difference, Justice Scalia, is that those are method of execution cases."). The point is not, of course, that Nelson's lawyer's representations are binding on anyone here. The point is simply that there was

a time, not too long ago, when participants on both sides of the debate agreed precisely how the question presented in *this* case should be resolved - namely, against §1983 review.

The amici States are gravely concerned that this case represents a second step (*Nelson* being the first) along a road to allowing all manner of execution-related challenges to proceed via §1983 - at the cost of the finality interests that the federal habeas corpus statute is designed to protect.

Amici will address three issues: (i) the fallacy that there is, in the real world, any meaningful difference between a challenge to an execution "procedure" and a challenge to the execution itself; (ii) the notion that Hill's claim here, had it been presented in a habeas petition, could have been anything but "second or successive"; and (iii) the suggestion, which underlies Hill's entire position, that, one way or another, he is entitled to an unencumbered opportunity to litigate his Eighth Amendment claim in federal district court.

I. David Larry Nelson: The Rest of the Story

Writing for 30 States in *Nelson*, the State of Ohio predicted that if this Court were to allow the §1983 suit there to go forward, "it is reasonable to assume that virtually all death-sentenced prisoners will be citing the '*Nelson* exception' as grounds for eleventh-hour stays." Br. of Ohio and 29 Other States at 15. This case bears out that prophecy. Hill's brief cites *Nelson* more than 50 times, says that the §1983 complaint here was "modeled on the one this Court approved" in *Nelson* (Hill Br. 2) and that this case "is on all fours with" *Nelson* (Hill Br. 13), and finally asserts that *Nelson* "requires reversal of the Eleventh Circuit's decision" (Hill Br. 12).

It is not so much the fact that Hill invokes *Nelson*, but rather the basis on which Hill invokes *Nelson*, that should interest the Court. Time and again, Hill insists that he is challenging only "the particular procedures" that Florida intends to use to execute him, and he purports to "concede[] that other methods of lethal injection the [State] could

choose to use would be constitutional." Hill Br. 17. Thus, Hill says, "[s]hould he prevail, the State would remain free to carry out his execution using more humane (and constitutional) lethal injection procedures." *Id.* at 3; *see also id.* at 12 (execution may proceed by "different means"); *id.* at 20-21 (same); *id.* at 22 ("different approach[]").

The "it's-just-a-procedure" move is to be expected. By so pleading, Hill seeks to bring his claim in line with that of Nelson, who, Hill says, also "conceded that other procedures for gaining [venous] access were constitutional." Hill Br. 20. Indeed, Nelson went so far as to suggest an alternative procedure that might be used to gain venous access in lieu of the challenged "cut-down," namely, "percutaneous central line placement." J.A. 17 (Complaint ¶63), *Nelson* (No. 03-6821). That procedure, Nelson said in his complaint, is "less invasive, less painful, faster, cheaper, and safer" than the cut-down and, further, "meets the contemporary standards of medical care" and thus "does not violate [Nelson's] Eighth Amendment rights." *Id.* at 17, 19 (¶¶65, 68, 78). Nelson made similar representations to this Court. Among them: (i) that he was "not trying to block his execution"[1]; (ii) that he did not "object to lethal injection" *per se*[2]; and (iii) that he had "no objection" to the percutaneous central line procedure.[3] The bottom line, according to Nelson, was that if the State would "concede that percutaneous line placement would be an acceptable method" of obtaining venous access, "then yes," "*[t]hat's all we were seeking.*"[4] Thus, Nelson asserted, "if, in the end, he is permitted to proceed in federal court and there obtains a favorable adjudication of his Eighth Amendment claim" challenging the cut-down procedure, "the immediate result will be to let the State execute him and thus accomplish its

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[1] Oral Arg. Tr. 6.

[2] *Id.* at 18.

[3] *Id.* at 17.

[4] *Id.* at 60 (emphasis added).

ultimate objective as well." Br. for Petitioner, *Nelson* (No. 03-6821).

Nelson's concessions were central to this Court's decision. The Court emphasized that "[i]f as a factual matter petitioner were unable or unwilling to concede acceptable alternatives for gaining venous access, respondents might have a stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself" and thus preclude §1983 review. 541 U.S. at 645. As it was, though (or seemed, anyway), Nelson had agreed to an alternative procedure - *i.e.*, percutaneous central line placement - that, if used, would "allow[] the State to proceed with the execution ...." *Id.* at 646. Echoing the "necessar[y] impl[ication]" standard of *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court held that because it would not "*necessarily* prevent Alabama from carrying out its execution" by other means, Nelson's challenge to the cut-down could proceed under §1983. 514 U.S. at 647.

But if ever a case proved the truth of Holmes' dictum that the life of the law is not logic (here, in the "necessar[y] impl[ication]" sense) but experience,[5] Nelson's is it. To its great consternation, the State of Alabama *continues to this day* to litigate Nelson's §1983 action in district court. Because the postscript to this Court's decision in *Nelson* sheds important light on the practicalities of the situation that Hill's case presents - and because we fear that Nelson's case is indicative of a larger and growing trend - we relate Nelson's story here in some detail. At the risk of killing the suspense, we will summarize the storyline briefly up front. Not to put too fine a point on it, Nelson's lawyers (i) reneged on the various representations they had made to this Court, (ii) challenged as "cruel and unusual" the very execution procedure they had suggested to this Court as a viable alternative, and (iii) to this point, anyway, seem to have

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[5] *See* Oliver Wendell Holmes, *The Common Law* 1 (1881).

gotten away with it. The tale of Nelson's machinations and manipulations is part tragedy, part farce.

A. A Cautionary Tale

True to its word,[6] the State of Alabama, on remand from this Court's decision, took the cut-down procedure off the table as a means of gaining access to Nelson's veins and agreed to proceed either on the basis of a simple peripheral needle stick or, failing that, according to Nelson's own preferred method - percutaneous central line placement. The colloquy that occurred during an initial status conference in the district court bears repeating at some length because it contains the seeds of the "mutation" of Nelson's claim. To start, the district court judge (Hon. Myron H. Thompson) asked counsel, "Can we all agree ... that the cutdown procedure will not be used?" Three times the State's lawyer answered, "Yes, your Honor," to which Judge Thompson responded: "I'm ordering it today. The cutdown procedure cannot be used by agreement of the parties."[7] Asked then by Judge Thompson, "What procedure will be used?" the State responded that "[a] peripheral vein will be accessed, and if that's not successful then a central line procedure will be used."[8] With that assurance - that the State intended to proceed according to Nelson's own chosen protocol - Judge Thompson inquired, "Isn't this case over now?" The State, not surprisingly, answered "Yes, sir."[9]

Nelson's lawyers answered "No."[10] When Judge Thompson asked "Why not?" Nelson's lawyers said that

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[6] *Nelson*, 541 U.S. at 646 (quoting State's agreement that "'percutaneous central line placement is the preferred method'" and observing that "the State now seems willing to implement petitioner's proposed alternatives").

[7] Hearing Tr. 6-7, *Nelson v. Campbell*, No. 2:03-CV-1008-T (Oct. 6, 2004).

[8] *Id.* at 7.

[9] *Id.* at 11.

[10] *Id.* at 11.

they believed that Nelson was "entitled under the Eighth Amendment to a detailed description of how [the State] plan[ned] to proceed."[11] Specifically, Nelson's lawyers – walking away from their earlier representation to this Court that "all [they] were seeking" was an injunction against the cut-down[12] – demanded to know "who is going to do [the central line procedure], where it's going to be done and what [are] the qualifications of the people who are going to perform the surgery."[13] Perplexed,[14] Judge Thompson asked "Why can't we just enter an order today that says by agreement of the parties the only procedures that will be used are ... peripheral venous access; and, if unsuccessful, then central line procedure also known as subclavian venous access? ... What's wrong with that order being entered today, case dismissed?"[15] Addressing Nelson's lawyers, Judge Thompson continued:

> You know, I have given you an opportunity to come up with the options. You said this was an option. You said it was one that you could live with. Why don't we just reduce this to a court order? *This is your protocol reduced to a court order.* That's it. What's wrong with that?[16]

Even as Judge Thompson emphasized that "[e]veryone is agreed now" and that "[w]e're agreeing with you around the board," Nelson's lawyers reiterated their new demands.[17] Specifically, they said, they "want[ed] ... a step-

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[11] *Id.* at 11.

[12] Oral Arg. Tr. 60, *Nelson* (No. 03-6821).

[13] Hearing Tr. 8, *Nelson*, No. 2:03-CV-1008-T (Oct. 6, 2004).

[14] *See id.* at 13 ("I'm not following you."); *id.* at 14 ("I don't understand.").

[15] *Id.* at 12.

[16] *Id.* at 12-13 (emphasis added).

[17] *Id.* at 14. Notably, these new objections were based in large part on Nelson's lawyers' repeated representations to Judge Thompson that their own central-line protocol entailed "a surgical procedure." *Id.*; *see also id.* at 8 ("[T]hat's what it is, it's surgery."). But that, too, contrasts starkly with

by-step procedure."[18] Judge Thompson cut them off mid-sentence:

> But if we do that, all you're going to do is come back and say well, they didn't tell us what step 2A will be and what step 2B [will] be when we didn't know you needed step 2A and 2B.
>
> *Cough up now or shut up.* Now tell me now what it is that you want. If you want to know who will do the procedure, if you want to know how it will be done, then ask for that now.[19]

Nelson's lawyers persisted: "We want to know who is going to do it, where they're going to do it, and what their qualifications are."[20]

When, in response, the State assured Judge Thompson that "if a central line procedure is necessary, then a doctor, a medical doctor is available to perform that procedure," one of Nelson's lawyers parried with yet another new objection: "[J]ust a general M.D., as far as I know, is not adequate" because, he now claimed, "[p]ercutaneous central line placement is a specialty ... that lots of doctors have never performed."[21] Thus, he said, "If it's somebody who is experienced in subcutaneous placement, then that's what we

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what they told this Court. Asked point blank by Justice O'Connor during oral argument whether percutaneous central line placement "require[s] a cut as well," Nelson's lawyer answered: "No, ma'am. It ... would just require ... a needle, a hollow needle, with a wire inside. ... It wouldn't require the kind of incision and all of the kind of auxiliary support systems." Oral Arg. Tr. 17.

[18] Hearing Tr. 16, *Nelson*, No. 2:03-CV-1008-T (Oct. 6, 2004).

[19] *Id.* (emphasis added).

[20] *Id.*

[21] *Id.* at 16-17. Again, inconsistencies abound: In challenging the cut-down and purporting to embrace central line placement, Nelson's original complaint said of the latter procedure: "Because of this procedure's more widespread use, more physicians are proficient and competent in performing this procedure as compared to the cut-down procedure." J.A. 17 (¶66), *Nelson* (No. 03-6821).

want."[22] Even when the State *further* assured Judge Thompson that its doctor "is experienced at performing procedures for intravenous access" and "has performed many central line procedures," Nelson's lawyers continued to dissemble.[23] At that point, Judge Thompson, obviously and understandably frustrated, decided to refer the entire matter to an independent medical expert.[24] *And at that point, of course, Nelson effectively won.* His lawyers had successfully managed to turn the case on its head, attack their own suggested procedure (the very procedure that this Court underscored as the basis for its decision allowing the §1983 suit to proceed), and delay indefinitely Nelson's scheduled execution.

On the heels of the status conference, the State moved to dismiss Nelson's §1983 complaint. In short, the State contended (i) that Nelson's complaint challenged only one procedure, the cut-down; (ii) that the State had expressly agreed not to use the cut-down and to proceed instead according to Nelson's own chosen protocol, which called for gaining venous access using, if necessary, a percutaneous central line procedure; and, therefore, (iii) that Nelson's Eighth Amendment claim was moot. *See* Motion To Dismiss, *Nelson*, No. 2:03-CV-1008-T (Oct. 29, 2004).

Six months later, Judge Thompson convened another status conference. At the hearing, the State objected to further proceedings on the ground that Nelson had not responded to, nor had Judge Thompson ruled on, the State's motion to dismiss.[25] Judge Thompson responded that "the reason I set this procedure up" - that is, of referring the case to a medical expert - "was so that I could rule on" that motion, because "I didn't know what the percutaneous

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[22] *Id.* at 17.

[23] *Id.* at 17-18.

[24] *See id.* at 19-20.

[25] Hearing Tr. 5, *Nelson*, No. 2:03-CV-1008-T (Apr. 12, 2005)

subclavian central line procedure is."[26] While acknowledging that it "underst[ood Judge Thompson's] position," the State said that it "would have to insist on a ruling."[27] The reason, the State explained, was that Nelson's §1983 complaint "contains allegations about just one procedure, and it's not anything about a central line procedure, it's about a cutdown procedure," which, of course, had been eliminated as a possibility. "[T]he lawsuit," the State pointed out, "seems to be kind of taking on new allegations."[28]

On the latter point, Judge Thompson agreed that "now that I think about it, you may be correct." But instead of dismissing Nelson's cut-down based complaint, Judge Thompson said that "[i]t may be that the plaintiff needs to further modify his complaint to make clear exactly what he's alleging."[29] Nelson's lawyers jumped at the chance. They said that they would "certainly be happy to" amend the complaint to the challenge the central-line procedure, which they subsequently did, thus formalizing their switcheroo.[30]

Nelson's amended complaint is astonishing - and eye-opening. Its allegations challenging central line placement (again, Nelson's own chosen procedure) echo, essentially verbatim, those that Nelson had earlier leveled at the cut-down. Indeed, Nelson's amended complaint proceeds in lockstep fashion to parrot the allegations of the initial complaint - only training them on the central line procedure - *for twenty straight paragraphs*. We have attached a revealing blow-by-blow comparison of the two as an appendix to this brief. But there are two highlights worth mentioning here because they so clearly unmask Nelson's lawyers' maneuvering and point up the problem with death-row

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[26] *Id.*

[27] *Id.* at 5-6.

[28] *Id.* at 6.

[29] *Id.*

[30] *Id.* at 9.

inmates' now-standard "it's-just-a-procedure" line. First, Nelson's amended complaint asserts that *precisely the same complications* would attend the use of percutaneous central line placement as would (his original complaint said) have accompanied the cut-down. In fact, the two complaints describe the supposed complications in *identical terms*:

> These complications include the very painful and life-threatening conditions of severe hemorrhage (with accompanying sense of asphyxiation and terror), pneumothorax (with accompanying severe distress, sense of suffocation and potential cardiovascular collapse), and cardiac dysrhythmia (abnormal electrical activity in the heart leading to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia).

J.A. 14 (¶49), *Nelson* (No. 03-6821) (cut-down); Second Amended Complaint ¶112, *Nelson*, No. 2:03-CV-1008-T (Apr. 22, 2005) (percutaneous central line placement). It is of course inconceivable that the two procedures - the cut-down, on the one hand, and Nelson's own percutaneous central line placement, on the other - could actually risk *exactly* the same complications. Nelson's lawyers were simply saying what they needed to say - and being none too coy about it - to keep the case alive and to keep Nelson's execution from going forward.

There is a second revealing juxtaposition. Paragraph 125 of Nelson's amended complaint (attacking the central line procedure) asserts that "[i]f the risks of inflicting pain and suffering associated with execution by lethal injection in the Plaintiff's case may be easily remedied or mitigated by employing *adequate safeguards*, the Defendants' failure to take these steps violates the Plaintiff's rights under the United States Constitution." *Id.* ¶125 (emphasis added). In his original complaint, Nelson had made exactly the same allegation, but with an important twist: "If the risks of inflicting pain and suffering associated with execution by lethal injection in the Plaintiff's case may be easily remedied

or mitigated by employing *alternative methods or altering the procedures employed in the execution process*, the Defendants' failure to take these steps violates the Plaintiff's rights under the United States Constitution." J.A. 16 (¶61), *Nelson* (No. 03-6821) (emphasis added). The "alternative method[]" or "alter[ed] procedure[]" to which Nelson's original complaint referred was - of course - percutaneous central line placement. Indeed, Nelson's original complaint spent the next six paragraphs extolling the virtues of that procedure, concluding with the statement that percutaneous central line placement "meets contemporary standards of medical care." *Id.* at 17 (¶¶62-67). Despite the otherwise perfect parallelism between the original and amended complaints, those six paragraphs are conspicuously absent from the amended version. *See* Second Amended Complaint, *Nelson*, No. 2:03-CV-1008-T (gap between ¶¶125 and 126). The reason, of course, is that the original complaint endorsed percutaneous central line placement as an humane alternative; the amended complaint attacks that same procedure as "cruel and unusual."

The State promptly moved to dismiss Nelson's amended complaint, pointing out not only the obvious - that Nelson was now challenging as unconstitutional the very procedure that he had earlier touted as an acceptable alternative - but also that he was challenging central line placement *on the very same grounds that he had challenged the cut-down*. *See* Motion To Dismiss Second Amended Complaint at 5, *Nelson*, No. 2:03-CV-1008-T (May 4, 2005). Regrettably, given Nelson's lawyers' baiting and switching, the State was left to draw only one conclusion: "that Nelson's previous representations to [the district court], the Eleventh Circuit, and the Supreme Court were a ruse and that Nelson's attorneys' sole motivation is to delay or stop the State from carrying out Nelson's lawfully imposed death sentence." *Id.* at 7. "As it turns out," the State observed, Nelson's §1983 suit "is, as the State has said all along, a challenge to [his] death sentence itself." *Id.* at 7-8.

Two years after this Court's decision in *Nelson*, which by all accounts should have brought about a speedy resolution of the litigation, the State's motion to dismiss remains pending in district court.

B. The Takeaway

1. So what's the moral to the story? Not that Nelson's lawyers are bad people; they have a client to defend, and they are defending him. The moral, instead, is simply that in the hurly burly of capital litigation - where claims mutate and targets move - logical postulates (*e.g.*, that X "necessarily impl[ies]" Y) often don't do the trick. The fact that a particular execution-related challenge - like Nelson's or Hill's - might, in some theoretical sense, be separable from the execution itself simply cannot be the test of §1983's applicability. As Nelson's case demonstrates, there can always be - and often will be - new challenges to new execution "procedures." The hydraulic pressure to muster and mount such challenges is overwhelming. And, of course, the nature and variability of those challenges are limited only by a condemned inmate's lawyer's imagination. If it's not the cut-down, it's the central line. If it's not this combination of chemicals, it's that combination. Or perhaps it's the length or width of the needle, the particular area of the body into which the State proposes to insert that needle,[31] the type of restraints on the gurney, or the qualifications of the attending medical personnel.[32] We are

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[31] *See, e.g.*, Hill Br. 7 (citing *Baze v. Rees*, No. 04-CI-01094 (Ky. Cir. Ct. July 8, 2005), *pending on appeal, Rees v. Baze*, No. 2005-SC-000543 (Ky. Sup. Ct.), as holding unconstitutional "lethal injection into the jugular vein of the neck of the condemned prisoner"); *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, at 6 (W. D. Mo. Jan. 31, 2006) (challenge to use of femoral artery).

[32] As shown by recent events in California, by demanding that a doctor be present, a death-sentenced inmate can effectively forestall his execution. *See, e.g.*, Louis Sahagun & Henry Weinstein, *California Calls Off Execution*, L.A. Times (Feb. 22, 2006); *see also, e.g., Taylor*, No. 05-4173-CV-C-FJG, at 7 (inmate insisting that doctor be present and then asserting that no doctor can ethically participate).

not being flippant or crass. Our point is that a death-sentenced inmate has every incentive - however natural that incentive may be - to delay his execution by whatever means necessary. The law, if it is to have any footing in reality, must take account of that fact.

Along these lines, it is important to point out that the line drawn in *Nelson* between "wholly unnecessary" or "gratuitous" execution procedures, on the one hand, and "necessary" ones, on the other - the former, but probably not the latter, being challengeable under §1983 - does nothing to ameliorate the problem. *Nelson*, 541 U.S. at 645-46. The reason, of course, is that there is no such thing as a strictly, technically, scientifically *necessary* execution procedure. There is, to be blunt, always some other way to carry out the execution. In *Nelson*, a cut-down was deemed unnecessary because other methods of obtaining venous access - among them, percutaneous central line placement - were available. But just as surely, percutaneous central line placement is not technically necessary to accomplishing a lethal injection; there are any number of other ways by which venous access can theoretically be established, even for an inmate, like Nelson, with compromised veins.

So, too, here. No particular cocktail of chemicals is strictly *necessary* to a lethal injection - as indicated, for starters, by the fact that different States use different cocktails. The number of available chemical-composition variations - not only the use of different doses of the traditional drugs sodium pentothal, pancuronium bromide, and potassium chloride, but also the use of entirely different drugs (*e.g.*, morphine) - is literally infinite. There is, as best we can tell, no limiting principle to an "unnecessary-ness" criterion. Of course, we don't point all of this out for the purpose of advocating that all chemical-composition (and, for that matter, all other execution-related) challenges be swept into the rule articulated in *Nelson*. Quite the contrary, we urge the Court to take notice of the real-world facts (i) that technically unnecessary execution "procedures" are innumerable and (ii) that a death-sentenced inmate can stop

an execution just as surely by challenging an execution "procedure" as by challenging the fact of his conviction or sentence itself.

2. In any event, if ever there was a challenge to an execution "procedure" so bound up with a challenge to the sentence itself as to be indistinguishable, this is it. *Nelson*, admittedly, involved a procedure (the cut-down) that was one small step removed from the administration of the lethal injection itself. Here, by contrast, the challenge is to the very substances that constitute that injection. Under *Heck v. Humphrey* and its progeny, Hill's claim may not proceed under §1983.

This Court has made clear that *Heck*'s "necessar[y] impl[ication]" standard should be applied functionally, not formalistically. In *Heck* itself, the Court characterized its holding as reaching beyond claims of "unconstitutional conviction or imprisonment" to encompass, as well, allegations of "other harm caused by actions whose unlawfulness would render a conviction or sentence invalid." 512 U.S. at 486-87. The Court thus clarified that *Heck*'s limitations on §1983 actions extend beyond unvarnished, frontal assaults on convictions and sentences *per se*. Rather, those limitations apply as well – as they must in the real world – to claims that, though perhaps not "directly attributable" to a conviction or sentence, *see id.* at 487 n.6 nonetheless necessarily affect the conviction's or sentence's validity.

In *Edwards v. Balisok*, 520 U.S. 641 (1997), this Court's emphasis on functional reasoning was even more apparent. There, the Court pointed to *Heck*'s "other harm" language in expressly embracing a practical, functional approach to the question whether a given §1983 claim "necessarily impl[ies]" the invalidity of a conviction or sentence. Balisok had filed a §1983 action alleging that the procedures utilized in a prison disciplinary hearing at which he was deprived of good-time credits violated due process. Like Hill here, Balisok insisted that his challenge was concerned solely with "procedures," and *not* with his ultimate sentence or punishment. *See, e.g.*,

Br. for Resp. at 6, 7, 8, 16, *Balisok* (No. 95-1352). As this Court summarized Balisok's claim, it "posited that the procedures were wrong, but not necessarily that the result was." 520 U.S. at 645. The Ninth Circuit had adopted a formalistic rule that a claim challenging procedures would *never* "necessarily imply" a punishment's invalidity within the meaning of *Heck* and thus was "always cognizable under §1983." *Id.* at 644.

In reversing, this Court unanimously rejected the Ninth Circuit's bright-line rule sanctioning all §1983-based challenges to disciplinary-hearing "procedures." Instead, the *Balisok* Court concluded that while some challenges to procedures will not run afoul of *Heck*, others certainly will. That determination, this Court emphasized, will depend on "the nature of the challenge to the procedures" and whether, in a particular case, the procedural challenge is "such as necessarily to imply the invalidity of the judgment." *Id.* at 645. And, indeed, this Court held that several of Balisok's challenges, although ostensibly aimed solely at the procedures employed, not at the punishment imposed, *did* "necessarily imply" the invalidity of his punishment within the meaning of *Heck*, and were therefore not cognizable under §1983.

Balisok's functional reasoning applies precisely to this case. Like Balisok, Hill insists that he is not attacking his death sentence *per se*, but is instead challenging only a "procedure" used to administer that sentence. That procedural challenge, he says, may proceed under §1983, without regard to the rules governing habeas corpus practice. What Hill apparently seeks in this case is a Ninth-Circuit-like rule that a challenge to an execution "procedure" can *never* amount to a challenge to the execution itself. But that is just the sort of wooden formalism that this Court rejected in *Balisok*. It is the "nature of [Hill's specific] challenge," *id.* at 645, that determines whether his §1983 claim is foreclosed by *Heck*. Viewed functionally, as *Balisok* shows it should be, it is clear that Hill's claim is barred. Just as *Balisok* demonstrates that the

legal relationship between a particular "procedure" and a sentence can be such that a challenge to the former is tantamount to a challenge to the latter, so, too, the *factual* relationship between the three-chemical "procedure" that Hill attacks (Hill Br. 6) and his death sentence - the former being the very substance of the latter - exposes Hill's challenge as one directed to his sentence.

II. Hill's Challenge, If Presented in a Habeas Petition, Would Be Barred as "Second or Successive" Under AEDPA.

Hill contends that even if his §1983 complaint were recharacterized as a habeas corpus petition, it would not be subject to dismissal under 28 U.S.C. §2244(b) as "second or successive" - even though, he freely admits, he has already litigated one habeas petition to conclusion. *See* Hill Br. 29-36. We respectfully disagree.

First, a bit of background. As this Court has observed, "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, *particularly in capital cases.*" *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (emphasis added). Specifically, Congress sought "to curb the abuse of the statutory writ of habeas corpus" and, thereby, to "address the acute problems of unnecessary delay and abuse in capital cases." H.R. Conf. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 944. In signing AEDPA, President Clinton lamented that "[f]or too long, and in too many cases, endless death row appeals have stood in the way of justice being served." Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 719, 720 (Apr. 24, 1996). The point of AEDPA, the President emphasized, was to "streamline Federal appeals for convicted criminals sentenced to the death penalty." *Id.*

One of the principal means by which Congress sought to "streamline" the appeals process was by severely restricting inmates' ability to file "second or successive" habeas petitions. 28 U.S.C. §2244(b). Section 2244(b)(1) requires

dismissal, without exception, of any claim raised in a second or successive petition that "was presented in a prior application." With respect to so-called "new claim" petitions - second or successive petitions raising claims, like Hill's Eighth Amendment claim here, that were "*not* presented in a previous application" - §2244(b)(2) requires dismissal save in two narrow circumstances. Specifically, Congress determined that an inmate may file a new-claim successive petition only:

- where the claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" (§2244(b)(2)(A)); or

- where *both* (i) the "factual predicate for the claim could not have been discovered previously through the exercise of due diligence" *and* (ii) the facts underlying the claim establish by clear and convincing evidence that the inmate is actually innocent (§2244(b)(2)(B)).

Hill claims here that he should not be subject to §2244(b)(2)'s bar because his Eighth Amendment claim - challenging the administration of Florida's lethal-injection statute, which was not enacted until January 14, 2000 - was "unripe" and "had no factual or legal predicate" at the time he was litigating his first habeas petition. Hill Br. 34; *see also id.* at 13 (same).[33] To be clear, Hill does *not* now contend that he qualifies under §2244(b)(2)(B)'s exception for claims that rest on a "factual predicate" that "could not have been discovered previously through the exercise of due diligence." And with good reason; in addition to requiring a previously unavailable "factual predicate," §2244(b)(2)(B) requires a petitioner to show that his claim implicates his

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[33] This Court denied certiorari respecting the Eleventh Circuit's affirmance of the district court's denial of Hill's habeas petition on January 10, 2000. *See Hill v. Moore*, 528 U.S. 1087 (2000).

actual innocence of the charged offense, a showing Hill cannot make. Instead, Hill contends that because the "predicate" for his claim was unavailable to him when he litigated his first habeas petition, his current claim is not "second or successive" at all.

There is, respectfully, a fundamental problem with Hill's argument: Although it purports to deal only with §2244(b)'s "second or successive" triggering condition and not with the operation of the statutory exceptions, it nonetheless ends up reading §2244(b)(2)(B)'s express actual-innocence limitation right out of the statute. The statute, to repeat, says that a petitioner may raise a claim based on a new "factual predicate" if, but only if, he can also make a clear and convincing showing of actual innocence. Hill says, quite differently, that a petitioner ought to be able to raise a claim based on a new predicate *simply because of the claim's newness* - wholly without regard to the claim's relationship to the petitioner's innocence. Under any fair reading of §2244(b)(2)(B), that cannot be.

Without coming right out and acknowledging the problem, Hill offers several solutions to it. None is persuasive.

1. It is not true, as Hill suggests (Hill Br. 33-35), that because his challenge might not have constituted an "abuse of the writ" under pre-AEDPA law, it cannot be deemed "second or successive" within the meaning of §2244(b)(2)(B). In essence, Hill's contention here is that AEDPA was just a blip - that Congress was satisfied with existing habeas practice and content simply to codify business as usual. But that is not so. In support of this what's-old-is-new interpretation, Hill quotes *Felker v. Turpin*, 518 U.S. 651 (1996), for the proposition that "[t]he new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" Hill Br. 33. But that passage merely indicates that §2244(b) is aimed, generally, at the same sort of problem - repetitive filings - targeted by the old abuse-of-the-writ doctrine. It does *not* suggest that what constitutes abuse, or

that the response to abusiveness, is the same now as before AEDPA. And, indeed, other language in *Felker* - found just before and just after the quote that Hill excerpts - makes clear that in enacting AEDPA Congress was *not* just treading water. This Court specifically referred there to "[t]he *added restrictions* which the Act places on second habeas petitions" and observed that while AEDPA "codifies some of the pre-existing limits on successive petitions," it also *"further restricts* the availability of relief to habeas petitioners." 518 U.S. at 664 (emphasis added); *see also See* Henry Hart & Herbert Wechsler, *The Federal Courts and the Federal System* 1386 (Richard Fallon, *et al.*, eds., 5th ed. 2003) ("In 1996, Congress amended §2244(b) to further restrict federal court power to entertain successive petitions.").

One of the country's leading death-penalty lawyers accurately summed up these "added" and "further" restrictions imposed by AEDPA's stringent second-petitions bar like this: "As a general matter" in the pre-AEDPA days, "any type of claim that was unavailable at the time of the earlier filing - because the legal or factual basis for that claim did not exist or was not reasonably knowable by the prisoner - was an appropriate candidate for inclusion in a successive petition." Bryan Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699, 736 (2002). "AEDPA's successive petition standard," he explained, "appears to incorporate this general approach, *but with one major difference.*" *Id.* at 737 (emphasis added). Specifically, and as particularly relevant here, "Subsection 2244(b)(2)(B)(ii) sharply diverges from [the] prior law ... by modifying the 'new facts' category to include an additional requirement that the prisoner make a showing of 'innocence.'" *Id.* at 737-38.

In other words, before AEDPA's enactment, a new claim could be presented in a second petition on a showing *either* (i) that cause existed to excuse the failure to present the claim earlier - for instance, the "unavailability of the factual basis for the claim" at the time the first petition was filed - *or*

(ii) that the petitioner was likely to be "innocent of the crime." *McCleskey v. Zant*, 499 U.S. 467, 494-95, 497 (1991); *see also* 2 Randy Hertz & James Leibman, *Federal Habeas Corpus Practice and Procedure* §28.3e, at 1454 (5th ed. 2005) ("proof of either 'cause and prejudice' or an innocence-focused variety of 'manifest miscarriage of justice'"). New §2244(b)(2)(B), by contrast, expressly tightens the second-petition standard by requiring a habeas petitioner to show *both* (i) a newly-discovered factual predicate *and* (ii) probable actual innocence. *See id* (explaining AEDPA's shift from a disjunctive cause-or-innocence standard to a conjunctive "cause and innocence" standard); Hart & Wechsler, *supra*, at 1386 (AEDPA "narrows the prior standards" by requiring that a second petition "satisfy both of two conditions (under *McCleskey*, they were essentially alternatives")).

No one, to our knowledge, has ever suggested that this conspicuous shift from an "either-or" standard to a "both-and" standard was the result of oversight. And, indeed, given all of the clamor about "reduc[ing] delays," "curb[ing] ... abuse," and "streamlin[ing] ... appeals" that accompanied AEDPA's passage (*see supra* at 18), it seems inconceivable that §2244(b)(2) is anything less than Congress' conscious design to punch-up the old abuse-of-the-writ doctrine and tighten the second-petition standards. Accordingly, the argument that underlies Hill's position here - that Congress could not possibly have intended to preclude second habeas petitions that raise new claims that, though not implicating actual innocence, are based on a factual or legal predicate not available at the time the first habeas petition was adjudicated - provokes a straightforward response: That is *precisely* what Congress intended, and it is virtually impossible to read §2244(b)(2) - particularly in the light the clear rejection of business as usual - any other way.

We should add that Congress' determination to limit §2244(b)(2)(B)'s reach to claims that (unlike Hill's) implicate an inmate's actual innocence is not only crystal clear, but also eminently reasonable. It appropriately tempers the

traditional habeas concerns of federalism, comity, and finality with a heightened solicitude for one uniquely compelling circumstance: an inmate's showing that he is actually, factually innocent - *i.e.*, that he didn't do it. *See Calderon v. Thompson*, 523 U.S. 538, 558 (1998) ("AEDPA's central concern" is "that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence."); *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) ("[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence.").

In *Lonchar v. Thomas*, this Court emphasized that , when it comes to prescribing the appropriate scope of habeas corpus, "balanc[ing] the relevant competing interests" is primarily a task for Congress, not the courts. 517 U.S. 314, 328 (1996). By enacting AEDPA - which, as relevant here, amends §2244(b)(2) - Congress struck a new and different "balance" concerning repetitive petitions. There is no basis for upsetting that balance now.

2. Contrary to Hill's suggestions (Hill Br. 29-33), neither *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), nor *Slack v. McDaniel*, 529 U.S. 473 (2000), salvages his counter-textual argument. At issue in *Martinez-Villareal* was a habeas petition presenting a "competency-to-be-executed" claim under *Ford v. Wainwright*, 477 U.S. 399 (1986). The condemned inmate had raised his *Ford* claim in a prior habeas petition, but the district court had "dismissed [the claim] as premature ... because his execution was not imminent and therefore his competence to be executed could not be determined at that time." *Martinez-Villareal*, 523 U.S. at 644-45. After the State had obtained an execution warrant, the inmate moved the district court to reopen his earlier-filed *Ford* claim. Based on AEDPA's successive-petitions bar, the district court refused. The Ninth Circuit reversed, seemingly on the broad ground that because, almost by definition, a *Ford* claim will not arise until after the first round of habeas litigation, AEDPA's successive-petitions bar "does not apply to a petition that raises only a

competency to be executed claim." *Martinez-Villareal v. Stewart*, 118 F.3d 628, 629 (9th Cir. 1997).

This Court affirmed but "on a much narrower ground than the appellate court had employed." Stevenson, *supra*, at 744. Whereas "the Ninth Circuit [had] essentially read into the statute an exemption for *Ford* claims," this Court "avoided deciding the broad issues in the case." *Id.* at 742, 747. This Court held only that the inmate there had not filed a "second or successive" habeas petition at all but, instead, had simply moved to reopen his *first* petition. *See Martinez-Villareal*, 523 U.S. at 643 ("There was only one application for habeas relief ...."). The Court concluded that in that unique situation, where a habeas petitioner moves to reopen an earlier-filed petition to obtain an initial merits determination of a previously-unripe claim, AEDPA poses no bar. The Court expressly did *not* adopt a broad-ranging exception to §2244(b)(2)'s successive-petitions bar for all claims that, for whatever reason, could not have been raised in a first petition. *See id.* at 645 n.*.

Neither *Martinez-Villareal* nor its successor, *Slack*, can be stretched to encompass Hill's case. Again, the numerically second petition in *Martinez-Villareal* was deemed a first petition because the petitioner there had moved to reopen a previously-filed claim. In *Slack*, a numerically second petition was deemed a first only because the actual first petition had been dismissed on exhaustion grounds and, thus, could be treated "as though it had not been filed." 529 U.S. at 488. Neither special circumstance applies here. Hill is not moving to reopen an earlier-filed claim; and because his first petition was denied on the merits, not for failure to exhaust or for some other technical deficiency, it cannot be deemed a non-event. There simply is no amount of massaging that could make Hill's challenge anything other than "second or successive."

Some have argued that this Court's decisions in *Martinez-Villareal* and *Slack* themselves so narrowly construe AEDPA's second-petition provisions as to "deviat[e] from statute's plain language." Hertz & Leibman, *supra*, §28.3e, at

1463. We needn't go so far today. By training very specifically on the unique procedural circumstances presented in those cases, this Court was, at least arguably, able to permit the claims there to go forward and still remain faithful to §2244(b)(2)'s text. But there should be no mistake: The much broader proposition urged by Hill in this case – that an inmate may file a second petition based solely on a new claim's newness, and even where his first petition was adjudicated on the merits – is irreconcilable with any fair reading of the statutory language. Even, that is, if *Martinez-Villareal* and *Slack* didn't break the camel's back, acceptance of Hill's more sweeping argument would.

3. Finally, and importantly, it is no answer to say that there may be a difference, for §2244(b)(2) purposes, between (i) a claim whose factual predicate existed but was unavailable at the time the first habeas petition was litigated and (ii) a claim whose factual predicate simply did not exist at the time the first habeas petition was litigated. Hill's claim, we acknowledge, is of the second variety, given that Florida did not adopt lethal injection as its principal method of execution until shortly after Hill's first habeas petition was finally adjudicated. But under AEDPA (and the history that led to that statute's adoption) the distinction is immaterial.

Hill has not made it, but one could imagine an argument positing that claims in the former category cannot proceed absent a showing of innocence in compliance with §2244(b)(2)(B), while claims in the latter are free of the statute's innocence limitation. But that argument cannot be squared either with AEDPA's plain language, with pre-AEDPA abuse-of-the-write doctrine, or with common sense. As for text, §2244(b)(2)(B) is written broadly and generically to require a habeas petitioner to demonstrate innocence whenever he raises any claim whose "factual predicate ... could not have been discovered previously through the exercise of due diligence." That language clearly reaches both categories of claims described above; whether a claim's factual predicate was existent but unavailable or simply

non-existent, it is one that "could not have been discovered previously through the exercise of due diligence." There is no basis for reading the statutory language to apply only to the first category.

What is more, §2244(b)(2)(B)'s language - covering any claim whose "factual predicate ... could not have been discovered previously through the exercise of due diligence" - fairly and accurately describes this Court's pre-AEDPA abuse-of-the-writ jurisprudence. In *McCleskey v. Zant*, this Court variously described the instances in which a habeas petitioner would *not* be found to have abused the writ in a second petition: where he had a "legitimate excuse"; where he "could not comply" with the requirement that he plead claims in a first petition; where "'the factual or legal basis for a claim was not reasonably available to counsel'"; and, similarly, where "the factual basis for the claim" was "unavailab[le]." 499 U.S. at 490, 493, 494, 497. All of those generic descriptions apply equally to claims whose factual predicates were (i) existent but unavailable and (ii) simply non-existent. *See also* Stevenson, *supra*, at 736 (under pre-AEDPA law "any type of claim that was unavailable at the time of the earlier filing - *because the legal or factual basis for that claim did not exist or was not reasonably knowable by the prisoner* - was an appropriate candidate for inclusion in a successive petition" (emphasis added)). By employing generic language - "factual predicate for the claim could not have been discovered through the exercise of due diligence" - Congress in AEDPA clearly adverted to pre-1996 practice and refused to distinguish between the two scenarios. It then (and this is the key) coupled that generic basis for a second petition with a requirement - applicable to *both* categories of claims - that a petitioner establish innocence before proceeding.

Finally, there is no good reason to think that Congress would have wanted to treat the two categories of claims differently. There is no functional difference between them. Whether a claim's factual predicate existed but was unavailable or simply didn't exist at the time the first habeas

was litigated, the point is that the petitioner cannot be faulted for not presenting the claim earlier. The equities are the same in both instances. If a claim's factual predicate existed but was nonetheless unavailable, such that there would have been "cause" under *McCleskey* for failure to present it, it is, as a legal matter, as if the factual predicate did not exist at all. What possible basis could there be for letting a petitioner whose claim did not exist proceed without meeting §2244(b)(2)(B)'s innocence limitation, while requiring a petitioner who technically had a claim *but who had absolutely no reasonable way of knowing about it* to show innocence before proceeding? The two petitioners are identically situated, and what's good for the goose (no one could dispute that §2244(b)(2)(B)'s innocence limitation applies to petitioners whose claims rest on existent-but-unavailable factual predicates) is good for the gander. As it should have, Congress treated them together using generic language that covered both situations – and required them *both* to show innocence before filing a new-facts-based second petition.

Hill's position invites the Court to ignore the balance that Congress struck and to re-write §2244(b)(2)'s plain language. The Court should decline to do so.

III. Hill Has No Absolute Right To Litigate His Eighth Amendment Claim in Federal District Court.

Underlying Hill's entire argument in this Court is the assertion that he is entitled – one way or another – to have his Eighth Amendment claim adjudicated specifically by a *federal* court. If not on federal habeas, then in §1983; if not in §1983, then on federal habeas. *See* Hill Br. 2 ("This case presents the question whether there is any federal forum ...."); *id.* ("The Eleventh Circuit below ... has wholly foreclosed access to the federal courts ...."); *id.* ("Mr. Hill has been denied any federal forum ...."); *id.* at 12 ("[T]he Eleventh Circuit denied Mr. Hill any federal forum ...."); *id.* at 15 ("[U]nder the law of the Eleventh Circuit, no federal court has subject matter jurisdiction to adjudicate his

claim."); *id.* at 16 ("[The] Eleventh Circuit ruling ... denied the petitioner any federal forum ....").

Notably, Hill does not claim here that he has been denied any remedy at all. And with good reason. Before filing the present §1983 suit, Hill filed in state court a successive motion for postconviction relief. Although the trial court rejected Hill's Eighth Amendment claim without holding an evidentiary hearing, the Florida Supreme Court addressed Hill's contentions on the merits and in some detail. Specifically, that court observed that it had held in 2000 that "'the procedures for administering the lethal injection [in Florida] do not violate the Eighth Amendment's prohibition against cruel and unusual punishment.'" *Hill v. State*, No. SC06-2, 2006 WL 91302, at *2 (Fla. Jan. 17, 2006) (quoting *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000)). The court acknowledged that Hill had come forward with new evidence bearing on the constitutional question - namely, (i) an April 2005 article published in the medical journal *The Lancet* and (ii) an affidavit from one of the *Lancet* study's authors. *See id.* at *1. After reviewing the study and affidavit, however, the Florida Supreme Court held that those sources did not "call into question [the earlier] holding in *Sims*." *Id.* at *2. In so holding, the court emphasized, among other things, that the study (i) used data only from other States, not Florida; (ii) is, by its own admission, "inconclusive"; (iii) does not indicate that "providing an inmate with '"no less than two" grams' of sodium pentothal, as is Florida's procedure, is not sufficient to render the inmate unconscious"; and (iv) does not provide evidence that "an adequate amount of sodium pentothal is not being administered in Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect." *Id.* This Court denied certiorari review of the Florida Supreme Court's decision. *See Hill v. Florida*, No. 05-8731, 2006 WL 160276 (U.S. Feb. 27, 2006).

Given the merits review that Hill received in the Florida Supreme Court (and the existence, even if unexercised, of certiorari review in this Court), the fact that Hill does not

have at his disposal the full panoply of federal-court remedies - including §1983 - is of no particular moment. There are all manner of procedural rules, defenses, and doctrines that, in certain circumstances, will operate to foreclose a federal court's consideration of a federal constitutional claim under §1983 - even where that claim has never before been decided on the merits. *See, e.g., Migra v. Warren City Sch. Dist.*, 465 U.S. 75, 83-84 (1984) (res judicata); *Wilson v. Garcia*, 471 U.S. 261, 280 (1985) (statute of limitations); *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998) (absolute immunity).

The unstated premise of Hill's argument here - that if habeas corpus is not available to him, §1983 must be - has been squarely rejected by this Court. In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court reviewed a lower-court decision holding, in essence, that because under *Stone v. Powell*, 428 U.S. 465 (1976), a state convict could not raise his Fourth Amendment claim in a federal habeas corpus petition, he was entitled to a "federal judicial hearing of that claim in a §1983 suit." *Allen*, 449 U.S. at 103. This Court expressly rejected that holding, as well as the supposition underlying it "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises." *Id.* That assumption, this Court observed, has no support either "in the Constitution" or "in §1983 itself." *Id.*

The *Allen* Court added, in words uniquely applicable here, that "[t]he only other conceivable basis for finding a universal right to litigate a federal claim in a federal district court is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues." *Id.* at 105. This Court then "emphatic[ally] reaffirm[ed] ... the constitutional obligation of the state courts to uphold federal law" and expressed its "confidence in their ability to do so." *Id., accord, e.g., Stone*, 428 U.S. at 493-94 n.35; *Huffman v. Pursue*,

420 U.S. 592, 611 (1975); *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974); *Ex parte Royall*, 117 U.S. 241, 251 (1886).

Accordingly, Hill's invocation of the maxim *ubi jus, ubi remedium* and citation to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), just don't wash. Hill has not been denied *a forum* in which to litigate his claim – he has, at most, been denied *a forum of his choice, i.e.*, an "unencumbered opportunity to litigate that [claim] in a federal district court." And under *Allen* and its precursors, that is a constitutional non-event. 449 U.S. at 103.

Hill had his day in court, and he lost. He then had recourse to this Court – a federal court, no less – by way of a petition for certiorari. That is all the law requires.

CONCLUSION

For the foregoing reasons, this Court should affirm the court of appeals' judgment.

Respectfully submitted,

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Appendix: A Side-by-Side Comparison of David Larry Nelson's Complaints

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
48. Of great concern is the fact that many complications of the cut-down procedure are well-recognized by the medical community. (See Paragraph 18 of Affidavit of Mark Heath, M.D.).	112. It is well recognized by the medical community that complications can occur when utilizing the percutaneous central line placement procedure. These complications include the very painful and life-threatening conditions of severe hemorrhage (with accompanying sense of asphyxiation and terror), pneumothorax (with accompanying severe distress, sense of suffocation and potential cardiovascular collapse), and cardiac dysrhythmia (abnormal electrical activity of the heart leading to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia).
49. These complications include the very painful and life-threatening conditions of severe hemorrhage (with accompanying sense of asphyxiation and terror), pneumothorax (with accompanying severe distress, sense of suffocation and potential cardiovascular collapse), and cardiac dysrhythmia (abnormal electrical activity of the heart leading to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia). (See Paragraph 18 of Affidavit of Mark Heath, M.D.).	
50. Whenever a cut-down procedure is performed in the elective surgical setting, it is imperative that the medical personnel performing the procedure have immediate access to a variety of drugs and medical equipment that includes but is not limited to suction, surgical lighting, surgical instruments, cautery, chest tubes, EKG monitors and equipment, and a defibrillator. (See Paragraph 18 of Affidavit of Mark Heath, M.D.).	113. Whenever a percutaneous central line placement procedure is performed in the elective surgical setting, it is imperative that the medical personnel performing the procedure have immediate access to a variety of drugs and medical equipment that includes but is not limited to suction, surgical lighting, surgical instruments, cautery, chest tubes, EKG monitors and equipment, and a defibrillator.
51. The Defendants have not	114. The Defendants have not as-

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
assured the Plaintiff that any of the drugs or medical equipment described above will be available during the medical procedure they intend to perform at Holman.	sured the Plaintiff that any of the drugs or medical equipment described above will be available during the medical procedure they intend to perform at Holman.
52. Furthermore, the Defendants refuse to supply the Plaintiff with any information concerning the personnel who will be present during the medical procedure to be performed on the Plaintiff prior to the legal procedure of his execution by lethal injection.	115. Furthermore, the Defendants refuse to supply the Plaintiff with any meaningful information concerning the personnel who will be present during the medical procedure to be performed on the Plaintiff prior to the legal procedure of his execution by lethal injection.
53. As Dr. Mark Heath explains, many, if not most, physicians have never personally performed a cut-down procedure and do not possess the requisite skills for competently and safely performing such a procedure. (See Paragraph 14 of Affidavit of Mark Heath, M.D.).	116. Most physicians do not possess the requisite skills to competently and safely perform a percutaneous central line placement procedure.
54. Hospitals in the private sector require medical practitioners to be credentialed for the specific procedure of cut-downs for the purpose of safeguarding patients by ensuring that procedures are performed by experienced and competent personnel. (See Paragraph 15 of Affidavit of Mark Heath, M.D.).	
55. Subjecting a person to a cut-down procedure in the hands of inexperienced personnel would represent a clear risk of a medical misadventure and botched outcome. (See Paragraph 16 of Affi-	117. Subjecting a person to a percutaneous central line placement procedure in the hands of inexperienced personnel would represent a clear risk of a medical misadventure and botched outcome.

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
davit of Mark Heath, M.D.).	
56. Any person undergoing a cut-down procedure should be entitled to review the credentials, certification, and training record of the medical personnel who will be performing the procedure. (See Paragraph 17 of Affidavit of Mark Heath, M.D.).	118. Any person undergoing a percutaneous central line placement procedure should be entitled to review the credentials, certification, and training record of the medical personnel who will be performing the procedure.
57. In the absence of such a review, *and particularly given Defendant Culliver's refusal to permit such scrutiny*, there is a complete lack of any reasonable assurance that the medical procedure Defendant Culliver intends to perform on the Plaintiff as a predicate to his execution will be humane. (See Paragraph 17 of Affidavit of Mark Heath, M.D.).	119. In the absence of such a review, and particularly given the Defendants' refusal to disclose any meaningful information, there is a complete lack of any reasonable assurance that the medical procedure the Defendants intend to perform on the Plaintiff as a predicate to his execution will be humane.
58. The cut-down procedure Defendant Culliver apparently intends to perform on the Plaintiff carries with it a substantial risk of inflicting substantial and prolonged pain. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (punishments are cruel when they entail exposure to risks that "serve[] no 'legitimate penological objective'"; prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement if he knows that inmates face substantial risk of serious harm) (citation omitted).	120. Given the Defendants' refusal to disclose any meaningful information and refusal to confirm adequate safeguards will be in place, the percutaneous central line placement procedure that the Defendants apparently intend to perform on the Plaintiff carries with it a substantial risk of inflicting substantial and prolonged pain. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (punishments are cruel when they entail exposure to risks that "serve[] no 'legitimate penological objective'"; prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement if he knows that inmates face substantial risk of serious harm) (citations omitted).

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
59. The cut-down procedure Defendant Culliver apparently intends to perform on the Plaintiff does not comport with evolving standards of decency. *See Gregg v. Georgia*, 428 U.S. 153, 171 (1976) and *Trop v. Dulles*, 356, U.S. 86, 101 (1958).	121. Given the Defendants' refusal to disclose any meaningful information and refusal to confirm adequate safeguards will be in place, the percutaneous central line placement procedure that the Defendants apparently intend to perform on the Plaintiff does not comport with evolving standards of decency. *See Gregg v. Georgia*, 428 U.S. 153, 171 (1976) and *Trop v. Dulles*, 356, U.S. 86, 101 (1958).
60. The cut-down procedure the Defendants apparently intend to perform on the Plaintiff impermissibly entails unnecessary mental as well as physical pain and suffering during the execution process. *See Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring).	122. Given the Defendants' refusal to disclose any meaningful information and refusal to confirm adequate safeguards will be in place, the percutaneous central line placement procedure that the Defendants apparently intend to perform on the Plaintiff impermissibly entails unnecessary mental as well as physical pain and suffering during the execution process. *See Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring).
	123. The Defendants through their actions are treating the Plaintiff with "deliberate indifference". *See Estelle v. Gamble*, 429 U.S. 97 (1976) and *Farmer v. Brennan*, 511 U.S. 825 (1994).
	124. The Defendants' "deliberate indifference" to the Plaintiff's serious medica needs violates the Eighth Amendment's prohibitions against cruel and unusual punishments and creates a risk of "unnecessary and wanton infliction of pain". *See Estelle v. Gam-*

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
	ble, 429 U.S. 97 (1976).
61. If the risks of inflicting pain and suffering associated with execution by lethal injection in the Plaintiff's case may be easily remedied or mitigated by employing alternative methods or altering the procedures employed in the execution process, the Defendants' failure to take these steps violates the Plaintiff's rights under the United States Constitution.	125. If the risks of inflicting pain and suffering associated with execution by lethal injection in the Plaintiff's case may be easily remedied or mitigated by employing adequate safeguards, the Defendants' failure to take these steps violates the Plaintiff's rights under the United States Constitution.
62. According to Dr. Mark Heath, there is an alternative procedure that the Defendants could utilize in gaining venous access in the Plaintiff that would easily remedy or mitigate the risks of unnecessary pain and suffering inherent in the cut-down procedure Defendant Culliver intends to utilize. (See Paragraphs 20, 21, 22, and 23 of Affidavit of Mark Heath, M.D.).	
63. This alternative procedure is referred to by several terms, including percutaneous central line placement, percutaneous central access, percutaneous central venous cannulation, and percutaneous technique. (See Paragraph 23 of Affidavit of Mark Heath, M.D.).	
64. This procedure has, except in rare circumstances, supplanted the use of the cut-down procedure and is superior to the cut-down procedure in virtually all regards. (See Paragraph 23 of	

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
Affidavit of Mark Heath, M.D.).	
65. This procedure is less invasive, less painful, faster, cheaper, and safer that [sic] the cut-down procedure. (See Paragraph 23 of Affidavit of Mark Heath, M.D.).	
66. Because of this procedure's more widespread use, more physicians are proficient and competent in performing this procedure as compared to the cut-down procedure.	
67. It would be extraordinarily rare to perform a central venous cut-down procedure without first attempting and failing to successfully obtain venous access using this procedure.	
68. The Defendants have not articulated a reason for implementing the barbaric cut-down medical procedure on the Plaintiff in lieu of the medical procedure available that meets contemporary standards of medical care.	126. The Defendants have not articulated a reason for refusing to provide the Plaintiff with the information requested in Paragraph 109, *supra*.
69. Of significance and as referenced above, Defendant Culliver will not disclose the training or qualifications of the person(s) responsible for performing either the medical procedure on the Plaintiff that Defendant Culliver has acknowledged must be performed as a predicate to the legal procedure of execution or the legal procedure of execution by lethal injection.	127. Significantly, as referenced above, the Defendants refuse to disclose the training or qualifications of the individuals responsible for performing the percutaneous central line placement procedure on the Plaintiff as a predicate to the Plaintiff's execution by lethal injection.

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
70. As such, it is unknown to anyone other than the Defendants whether a physician with the appropriate credentials, training, and experience will even be present during the requisite medical procedure and/or the legal procedure of execution by lethal injection.	128. As such, it is unknown to anyone other than the Defendants whether a physician with the appropriate credentials, training, and experience will even be present during the percutaneous central line placement procedure.
71. The refusal of the Defendants to identify and describe the medical personnel, if any, that will be present during the medical procedure performed on the Plaintiff and during the execution itself raises issues of constitutional importance.	129. The refusal of the Defendants to identify and describe the medical personnel, if any, that will be present during the percutaneous central line placement procedure performed on the Plaintiff raises issues of constitutional importance.
72. The Defendants are deliberately preventing the public, the courts, and the condemned prisoners themselves from knowing any meaningful information about the lethal injection protocol and any accompanying medical procedure protocol that the Defendants intend to use in the killing of citizens of the State of Alabama.	
73. Independent public scrutiny undeniably plays a significant and indispensable role in the proper functioning of capital punishment.	
74. Public disclosure of Alabama's lethal injection protocol and accompanying mandated medical procedures for gaining venous access are critical in allowing the public to determine whether the punishment of exe-	

ORIGINAL COMPLAINT: CUT-DOWN

cution by lethal injection in the State of Alabama comports with "the evolving standards of decency which mark the progress of a maturing society". *Trop v. Dulles*, 356 U.S. 86 (1958).

75. For this Court and for the public to determine whether lethal injection execution in the State of Alabama in being humanely administered in cases where peripheral intravenous access is not possible, the State of Alabama must disclose reliable information about its lethal injection protocol and the mandated medical procedures that will be employed to gain venous access in condemned prisoners.

76. As it stands now, this Court, the public, and the Plaintiff are being forced to rely upon the very people responsible for designing and administering the protocol and performing the invasive and risky medical procedures for assurances that the protocol and procedures are sound and that they comport with "the evolving standards of decency".

77. in order to pass constitutional muster, an independent body - such as this Court or the public - must be allowed to review the State of Alabama's protocol.

78. It should be stressed that there exists a humane method fro gaining venous access in the Plaintiff that does not violate the Plaintiff's Eighth Amendment

AMENDED COMPLAINT: CENTRAL LINE PLACEMENT

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
rights, but Defendant Culliver is adamant that he intends to implement an inhumane method for gaining venous access in the Plaintiff that does violate the Plaintiff's Eighth Amendment rights.	
79. Given the fact that Defendant Culliver has conceded that the Plaintiff's execution will mark the first instance of the State of Alabama having to first perform an invasive medical procedure on a condemned inmate to gain venous access, there exists a substantial risk that the Defendants intend to violate the Eighth Amendment's prohibitions against inflicting cruel and unusual punishments with respect to the Plaintiff.	
80. Given the posture that the Defendants have taken regarding the secrecy of the lethal injection protocol and accompanying mandated medical procedures, this Court cannot be confident that the Defendants are taking all necessary and appropriate steps to minimize the known significant risks of inflicting severe and unnecessary pain and suffering in administering the punishment of lethal injection execution to the Plaintiff.	130. Given the posture that the Defendants have taken regarding the secrecy concerning the utilization of the percutaneous central line placement procedure, this Court cannot be confident that the Defendants are taking all necessary and appropriate steps to minimize the known significant risks of inflicting severe and unnecessary pain and suffering in gaining venous access as a predicate to the Plaintiff's execution.
81. Where, as here, the Plaintiff has demonstrated the existence of genuine and realistic concerns about the humaneness of the execution procedure, it is respectfully submitted that this Court	131. Where, as here, the Plaintiff has demonstrated the existence of genuine and realistic concerns about the medical dangers associated with the execution procedure, it is respectfully submitted

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
cannot, in good conscience, condone the risk of sending the Plaintiff to his state sponsored death without first assuring itself that the constitutional prohibitions against the infliction of "unnecessary pain in the execution of the death sentence" will be honored. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).	that this Court cannot, in good conscience, condone the risk of sending the Plaintiff to his state sponsored death without first assuring itself that the constitutional prohibitions against the infliction of "unnecessary pain in the execution of the death sentence" will be honored. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).